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IN THE

Supreme Court of the United States

October Term, 1973

~~73-~~ **No. 918**

EVE PELL, BETTY SEGAL and PAUL JACOBS,
Appellants,

v.

RAYMOND K. PROCUNIER, Director, California Department of Corrections *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

APPELLANTS' BRIEF

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APPELLANTS' BRIEF

Opinion Below

The decision and opinions of the three-judge district court are reported at 364 F. Supp. 196 and are reproduced in the Appendix hereto, referred to as "App. _____".

Jurisdiction

The jurisdiction of this Court to review a decision of the specially constituted district court is based on 28 U.S.C. § 1253 and 2101(b). The judgment of the district court was entered on August 16, 1973, a notice of appeal to this Court was filed on October 11, 1973, and this Court noted probable jurisdiction on January 21, 1974, consolidating this case with *Procunier v. Hillery*, No. 73-754.

State Provision Involved

California Department of Corrections Manual Section 415.017:

> "Press and other media interviews with specific individual inmates will not be permitted."

Questions Presented

1. May California impose a total and inflexible ban on press interviews with specific individual inmates in all of its prison camps, minimum-security institutions, work-release programs, and other institutions, even though many other members of the public are allowed such interviews?

2. Does the press have a First Amendment right of access in order to gather news?

3. Are the rights of the press adequately protected by the press-inmate contacts that California does allow?

4. Did the district court correctly conclude that California had not shown such harm from press interviews with specific individual inmates, as to meet the "compelling state interest" and "least drastic alternative" tests required by the First Amendment?

Statement of the Case

Proceedings

On November 8, 1971, Booker T. Hillery, an inmate at San Quentin Prison, filed a complaint for damages in the district court alleging that defendant-appellees Procunier, Nelson and Park, all officials of the California prison system,* were denying him an interview with the editors of Earth Magazine. An order to show cause was issued by a single-judge district court and on January 13, 1972, appellees filed a return. On March 8, 1972, a first amended complaint for damages and declaratory and injunctive relief was filed.

The amended complaint added as plaintiffs three inmates John Larry Spain, Bobby Bly and Michael Shane Guile, and also appellants Eve Pell, Betty Segal and Paul Jacobs; it also added as a defendant the appellee Joseph O'Brien. The new pleading alleged the original claim of Hillery and further alleged that Eve Pell was a freelance author who had been denied a request to interview Spain about prison conditions; that Betty Segal was a newspaper reporter who had been denied a request to interview Bly about a law suit he had filed challenging prison conditions; and that Paul Jacobs was a television reporter, author and editor, who had unsuccessfully sought permission to interview Guile about racial tensions in prison. The amended complaint "sought to prevent the administration of San Quentin State Prison from improperly denying, under color of state law, prisoners the right to private visits with specific media personnel."

* Appellees are Raymond K. Procunier, Director of the California Department of Corrections; Louis S. Nelson, Warden of the California State Prison at San Quentin; James W. L. Park, former Associate Warden of the California State Prison at San Quentin; and Joseph R. O'Brien, former Public Information Officer at the California State Prison at San Quentin.

On April 6, 1972, defendants moved to dismiss the amended complaint and brought § 415.017 to the court's attention. On September 29, 1972, the single-judge district court issued an opinion and order declaring Section 415.071 invalid as a violation of the First Amendment. The Court permanently enjoined the enforcement thereof and directed defendants to submit a proposed new rule consistent with the opinion. On October 4, 1972, defendants filed a motion to vacate the order alleging that the single-judge district court was without jurisdiction to enjoin enforcement of a regulation having statewide application, and the plaintiffs did not oppose the motion. On November 1, 1972, the September 29 opinion and order were therefore set aside. However, the single-judge court issued a temporary restraining order pending adjudication before a three-judge district court.*

The matter was heard before the three-judge district court on February 24, 1973, and some testimony was taken on behalf of the defendants. After the filing of additional memoranda by the American Civil Liberties Union, *amicus curiae*, and by defendants, the matter was submitted.

Facts

The opinion of August 16, 1973, sets forth the facts about which there is no significant dispute. The district court found that prior to the late 1960's, interviews between prisoners and the press were relatively infrequent. However, the number of requests for such interviews increased substantially, with the rise of discontent within the prisons and the consequent increase in public concern and interest.

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* Interim regulations were promulgated by the Department of Corrections on November 6, 1972, and were tentatively approved by the single-judge court on February 8, 1973. These are referred to as Regulation 72/40 and are reprinted in the Joint Appendix 104.

On August 21, 1971, three San Quentin staff members and two inmates were killed in an incident involving inmate George Jackson. Although prison officials attributed this incident to press interviews and thereupon promulgated § 415.071, the district court found, after taking testimony, that there was no evidence of a "direct relationship" between press interviews and prisons violence. App. 45-47. With respect to these particular plaintiffs, the Court specifically found that neither the inmates nor the journalists posed security problems. *Id.* at 31. Nor, according to the Court, was there evidentiary support for any claim that the press interviews would create any other interference with legitimate state interests, such as administrative efficiency and rehabilitation. The district court therefore struck down the regulation on the ground that it interfered with the prisoners' rights under the First Amendment, while noting that reasonable limitations as to time, place and manner were appropriate, and that if a particular interview were shown to pose a clear and present danger to prison security, it could be denied.

Despite the above findings and conclusions, the district court read *Branzburg v. Hayes*, 408 U.S. 653 (1972), and *Seattle-Tacoma Newspaper Guild v. Kleindienst*, 480 F.2d 1062 (9th Cir. 1973), as precluding a First Amendment right in the press to interview specific individual inmates. It therefore dismissed the press-appellants' claims.

Defendants filed a notice of appeal and a jurisdictional statement, and this Court noted probable jurisdiction thereof on January 7, 1974 *sub nom. Procunier v. Hillery*, No. 73-754. On October 11, 1973, the press-appellants filed a notice of appeal, and thereafter filed their jurisdictional statement. On January 21, 1974 this Court noted probable jurisdiction *sub nom. Pell v. Procunier*, No. 73-918, and consolidated the two appeals.

Summary of Argument

1. In August 1971, defendant Raymond Procunier suddenly reversed a long-standing policy in California, and banned all press interviews with specific individual inmates. The ban applied throughout California's twelve correctional institutions, no matter how mild, well-behaved and obscure the prisoner, no matter how minimal the security of the particular institutions and regardless of any other circumstances. The three-judge district court unanimously found that this universal and inflexible ban violated the First Amendment rights of California prisoners and was not justified by security, administrative or rehabilitative considerations. The court nevertheless concluded that *Branzburg v. Hayes*, 408 U.S. 665 (1972) had denied the press a "special newsgathering privilege" beyond that of the "average citizen," App. 34-35 and therefore the press had no First Amendment right of access to interview specific inmates.

The district court decision misconstrued both the press-appellants' claim and the decision of this court in *Branzburg*. The press-appellants are seeking not "special" privileges, but visiting rights that are available to family, clergy, attorneys, and many others every day in the year. Moreover, *Branzburg* did not hold or even say that the press has no particular newsgathering rights, but only that where the "public generally" cannot go, such as a grand jury, closed legislative sessions, etc., the press may not go either. Indeed, *Branzburg* quite clearly recognized that newsgathering is entitled to First Amendment protection, as have numerous decisions before and after that decision.

Nor are the press-appellants seeking an "unrestrained right to gather information," *Zemel v. Rusk*, 381 U.S. 1, 17 (1965), but one that truly accommodates the needs of both the First Amendment and the prison system.

2. The burden imposed by the California regulation on the press is very severe, regardless of other means of inmate-press contact; the burden remains very heavy even if the Court affirms the district court's ruling in favor of the prisoners' First Amendment rights.

a. Numerous decisions, including the court below, have found, after much testimony, affidavits, and other forms of proof, that there are no adequate substitutes for face-to-face interviews with specific individual inmates. See, *e.g.*, *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972); *Hillery v. Procunier*, 364 F. Supp. at 200-01; *Washington Post Co. v. Kleindienst*, ____ F.2d ____, No. 72-1362, slip op. 10-13 (D.C. Cir. 2/21/74), *aff'g* 357 F. Supp. 779, 781 (D.D.C. 1972) (and see Fact Findings 24-26 in the *Washington Post* case, reprinted in the Appendix C to this brief); *Houston Chronicle Pub. Co. v. Kleindienst*, 364 F. Supp. 719, 730 (S.D. Tex. 1973); *Burnham v. Oswald*, 342 F. Supp. 880, 885 (W.D.N.Y. 1972); *McMillan v. Carlson*, ____ F. Supp. ____, No. 72-2551-M (D. Mass. 12/31/73); *Globe Newspaper Co. v. Bork*, ____ F. Supp. ____, No. 73-3748-G, memo op. 8 (D. Mass. 1/12/74).

b. Nor can the press rely on the prisoners' rights of free expression. In many cases, the prisoners may be fearful of exercising those rights in the coercive setting of the prison; in other cases, the prisoner may have no great interest in initiating an interview. Indeed, defendants' own public information officer testified that he had "never really dealt with an instance in which an inmate has asked to be interviewed." Joint App. 248, 258.

3. The district court offered no justification for the denial of a press right of access other than its construction of *Branzburg v. Hayes*, but rather rejected all of defendants' justifications when it upheld the inmates' right of expression. These latter findings were clearly correct.

a. No serious burden can be imposed on the First Amendment rights involved herein without a showing of both a compelling state interest and the absence of less drastic alternatives. The district court correctly found that no such showing had been made.

b. Security considerations do not justify a universal and inflexible ban on press interviews with specific individual inmates, at any time, under any circumstances, in any type of institution. Such a ban is especially unnecessary here, where the district court explicitly found that neither the particular press-appellants nor inmate-plaintiffs pose security problems. The regulation is thus overbroad.

c. Administrative convenience is not a significant factor, for relatively few interviews are involved, and appropriate regulations can be devised.

d. Many, many other jurisdictions allow press interviews, and apparently without any serious problems of any kind.

e. Indeed, defendant Procunier himself testified in the *Washington Post* case that he would prefer a flexible approach, but his lawyers told him that such an approach would create legal problems. Joint Appendix 301-03; see also *Washington Post Co. v. Kleindienst*, 357 F.Supp. 770, 774 (D. D.C. 1972), *aff'd*, ____ F.2d ____, No. 72-1362 (D.C. Cir. 2/21/74). Defendant Park has similarly urged the value of press-prisoner interviews. Park, *On Being Medium Nice to Prisoners*, [1973] WASH.U.L.Q. 607, 615. as have other experienced correctional administrators like Maurice Sigler, Chairman of the Federal Parole Board and former President of the American Correctional Association. Virtually all commentators agree.

4. If improvements in our seriously deficient penal system are to be made, then we must have an aggressive press investigating prison conditions and able to talk to specific inmates.

ARGUMENT

Introduction

From the founding days of the Republic to the present, the newsgathering function of the press has been the lifeblood of a free society. Madison and Jefferson repeatedly insisted that our survival as a free society depends on "popular information . . . [and] the means for acquiring it."* Francis Lieber, the nineteenth century American political theorist, wrote: "The journals are to the modern freeman what the agora was to the Athenian, the forum to the Roman."** Today, more than ever, the newsgathering function has been proved vital to the continued health of our political and social institutions.

Nowhere is this function more crucial than to our prison system. For too long, prisons have remained on the dark side of our society, unknown and uncared about. Inefficiency, cruelty, waste—all were common and have now come to light in a tragically bloody manner. Now, however, the community has begun to wonder about where its tax dollars are going and what good they are doing. To this increasing community concern, the press has contributed heavily, with news and feature stories, descriptions

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* 6 WRITINGS OF JAMES MADISON (Hunt ed. 1906) ("A popular government without popular information or the means for acquiring it is but a prologue to a farce or tragedy or perhaps both"); XII PAPERS OF THOMAS JEFFERSON (Boyd ed.) 48-49.

** *On Civil Liberty and Self-Government* (1853), reprinted in Nelson (ed.), FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT 377, 378 (1967).

of prison conditions, and interviews with specific inmates. Most prison administrators formerly prohibited such interviews, but now that has changed, and many, if not indeed most, prison administrators allow such interviews.

This case raises the question of whether the State of California can turn the clock back and shut out effective press coverage of what is happening in its penal system.

I. The press-appellants are seeking only the kind of reasonably regulated access to specific individual inmates that is presently available to family, attorneys, clergy and many others.

It is important to note that the district court presented no policy or other considerations for its denial of press access rights—it relied solely on its construction of *Branzburg*. Nor could it have done otherwise for in the inmate-rights part of its opinion, it effectively demolished all the security, administrative and other arguments offered by defendants. If the inmates' part of the opinion is correct, the only question is the district court's construction of *Branzburg*.

A. The district court misconstrued the basis of press-appellants' claim

The district court read *Branzburg v. Hayes, supra*, as denying "newsmen special news gathering privileges." App. 34-35. "The press," held the district court "enjoys no greater right to access to news sources than the average citizen." *Ibid.* 34-35.

Regardless of the validity of the latter point in other contexts, see Point II below, here the press-appellants are not seeking "special" rights unavailable to "the average

citizen," but only those which are already available to vast numbers of average citizens. For California permits visits and interviews with individual specific inmates by huge numbers of people: family, clergy, attorneys, social workers, and many others,* Joint App. 262-63, as do all other prison systems. Indeed, it allows "special purpose visits" to specific inmates on an individual basis even for people without such relationships, depending on the purpose of such a visit. *Ibid.* All are, of course, subject to reasonable security and other regulations, as would be those sought here.

Admittedly, each of these visiting groups has some kind of more than "average" interest that makes a visit necessary, but so does the press—the latter has a high First Amendment interest to promote the community's right to know what is going on in governmental institutions. See, *e.g.*, *Branzburg v. Hayes*, 408 U.S. at 681, 704-05; *Kleindienst v. Mandel*, 408 U.S. 753, 763-65 (1972); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936); *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *Lovell v. Griffin*, 303 U.S. 444, 452 (1938); *Mills v. Alabama*, 384 U.S. 214, 219 (1966); *Nolan v. Fitzpatrick*, 451 F.2d 545, 547 (1st Cir. 1971); *Associated Press v. KVOS*, 80 F.2d 575 (9th Cir. 1935) rev'd on other grounds, 299 U.S. 269 (1936); *Kovach v. Maddux*, 238 F.Supp. 835 (M.D. Tenn. 1965) (reporter unconstitutionally excluded from State Senate floor). *Cf. Lewis v. Baxley*, ___ F.Supp. ___, 42 U.S.L.W. 2347 (D. Ala. 1973) (3-judge court). Where there are so many exceptions to a general ban, excluding the press wrongly discriminates against them and the constitutional interest they represent. Indeed the First

* Apparently including just friends. See Joint App. 269.

Amendment actually grants them a *preferred* status, and discriminations which heavily burden First Amendment values are especially reprehensible, as this court and others have consistently held. *Chicago Police Dept. v. Mosley*, 408 U.S. 92, 100-01 (1972); *Niemotko v. Maryland*, 430 U.S. 268 (1951); *Adams v. City of Park Ridge*, 293 F.2d 585, 589-90 (7th Cir. 1961); *Providence Journal v. McCoy*, 94 F.Supp. 186, 194 (D. R.I. 1950), *aff'd*, 190 F.2d 760 (1st Cir. 1951) (records available to others cannot be denied to press); *Consumers Union v. Periodical Corr. Ass'n*, 365 F.Supp. 18 (D. D.C. 1973) (one reporting group may not be excluded from press association).

Many of the numerous cases striking down no-access rules in prisons like that at issue here, have made the same point. See *Washington Post Co. v. Kleindienst*, ____ F.2d ____, No. 72-1362 (D.C. Cir. 2/21/74) ("the right of access of the press to report an event is customarily as broad as the general public's access to it. *Estes v. Texas*, 381 U.S. 532, 540 (1965)" slip op. 9); *Houston Chronicle Pub. Co. v. Kleindienst*, 364 F. Supp. 719, 725 (S.D. Tex. 1973); *Globe Newspaper Co. v. Bork*, (memo op. 11).

Nor is there any particular reason to single out the particular plaintiffs here. The district court found—and this was undisputed—that "none of the prisoner plaintiffs has been alleged by the defendants to have presented security problems; nor have defendants alleged a proclivity of these media plaintiffs to create security risks." App. 31. All that plaintiffs seek is what many others already have, and solely in order to fulfill a basic First Amendment need—to provide the community with information about prison conditions.

Finally, it must be stressed that the press is not seeking an "unrestrained right to gather information," as the dis-

trict court implied. Reasonable regulations as to time and place, and special limitations where there are specific security risks, are obviously in order and the press does not seek otherwise. *Washington Post Co. v. Kleindienst,* ___ F.2d ___ No. 72-1362, slip op. 23; Compare *Burnham v. Oswald,* 333 F.Supp. 1128 (W.D.N.Y. 1971) (post-Attica emergency) with 342 F.Supp. 880 (W.D.N.Y. 1972); *Seattle-Tacoma Newspaper Guild v. Parker,* 480 F.2d 1062, 1064 (9th Cir. 1973) (regulation appropriate for maximum security institution on "heels of riot," see App. 46). Where there are individual problems they can be individually handled. See *Seale v. Manson,* 326 F.Supp. 1375, 1383 (D. Conn. 1971) (particular prisoner's notoriety justified some limits on press access to him; App. 46).* It is the rigid universality of defendants' ban on press interviews with specific inmates, when exceptions are made for others with no higher interest, of which the press complains in this Point.

II. The press has a First Amendment right to gather news in order to meet a democratic society's need to know.

A. The press has a unique watchdog function.

Even if few or no others were allowed in prison, however, the press would still be entitled to access because "the function of the press is unique." *Globe Newspaper Co. v. Bork,* memo op. 8.

The press's watchdog function is indispensable to representative government. In 1800 Tunis Wortman wrote profoundly and at length about the special role of "political

* This is not to say that press-appellants agree with the specific rulings in the cited cases. They do, however, illustrate the principle that discretion is feasible.

Investigation" in representative government. Exercise of the franchise, continuing scrutiny of public officials, candidacy for public office—"the Representative System unavoidably implies an absolute right to investigate the conduct of all public officers . . ." Wortman, *A Treatise Concerning Political Inquiry*, (1800) reprinted in LEVY, FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 267 (1966). And for this purpose, a free press is indispensable to a representative government. "Ambition cannot fail to dread that vigilant guardian of Public Liberty whose eye can penetrate and whose voice be heard in every quarter of the State." *Id.* at 273. Indeed, some students have concluded that "the driving force behind the First Amendment was primarily the desire to check possible abuse of government by preserving an untrammelled press . . ." See, *e.g.*, Note, *Access to Official Information: A Constitutional Right*, 27 Ind. L. J. 209, 218 n.35 (1952). As Judge McGowan put it in the *Washington Post* case: "The First Amendment rights of the press are, of course a function of the paramount right of the public to information necessary to enable it to assert ultimate control over the political process." Slip op. 7.

This Court and other institutions have frequently recognized this "unique" watchdog role of a free press. See, *e.g.*, the many cases cited at p. 11 above, including *Branzburg v. Hayes* and *Kleindienst v. Mandel*. Note, *Reporters and Their Sources*, 80 YALE L. J. 317, 326-29 (1970).

Other agencies of government recognize this as well. Press galleries and special privileges are provided in recognition of its special role. See, *e.g.*, *Kovach v. Maddux*, *supra*; *Consumers Union v. Periodical Correspondents Ass'n.*, *supra*. The press will often be allowed in courtrooms when the general public is not. See, *e.g.*, Lubasch,

Trial of Mitchell and Stans Starts Here Today, N.Y. Times, Feb. 19, 1974, p. 14, col. 2 (city ed.) (during jury selection period, public was barred because of space shortage, but press had a 10-member pool present).

B. The press' watchdog function is especially vital with respect to prisons

The press has an especially "invaluable watchdog function with respect to prisons, whose very nature imbues the press function with heightened significance in comparison to other, more open institutions." *Globe Newspaper Co. v. Bork*, memo op. 8; *Burnham v. Oswald*, 342 F.Supp. at 886; *cf. Palmigiano v. Baxter*, 487 F.2d 1280, 1283 (1st Cir. 1973) (invisibility of most prison decision-making deplored).

Defendant Procunier himself seems to recognize this. In his *Washington Post* testimony which he introduced in this proceeding, he indicated that he would have *preferred a* flexible rule as suggested by Judge Gesell in their colloquy, but his lawyers told him he could not do so legally. Thus, he testified:

> The Witness: My attorney suggested to me—we were thinking along the same lines you are suggesting [*i.e.*, a flexible rule]—that I had to make it apply to everyone or I would not be allowed the prerogative that you suggest here. That is the only reason I have it across the board.
>
> The Court: In other words, as a correctional matter, putting aside legal considerations, you would tend to want to make the non-interview thing selective also?
>
> The Witness: Yes, sir.
>
> The Court: And it is because of legal considerations that you put it across the board?
>
> The Witness: Yes, sir.

See Joint App. 303; for a fuller discussion of this point, see *id.* at 301-02.

This point was duly noted by the district court in the *Washington Post* case in its conclusion that "were" it not for questionable legal advice [Mr. Procunier], "would still permit interviews in many sectors of his statewide correctional system." 357 F.Supp. 770, 774 (D.D.C. 1972), *aff'd.* ___ F.2d ___, No. 72-1362 (2/21/74).

Another defendant in this case, Mr. Park, is apparently of a similar mind. Thus, he recently wrote:

> "A far better provision for opening prisons to the public eye is to safeguard the right of access to all public institutions by responsible newsmen. Where the president of the local Ladies' Aid Society can inform only the few in her group, the media can inform millions of citizens about prison programs. The media does a good job of reporting in most instances, and prison administrators should have no qualms about admitting responsible reporters to view prison activities and to interview men in these programs." Park, *On Being Medium Nice to Prisoners* [1973]WASH. U. L. Q. 607, 615.

Other prison administrators agree. The Chairman of the Federal Parole Board and former President of the American Correctional Association Maurice Sigler declared recently:

> "The media can be an enormous asset to corrections, and it often has been. It is for the most part committed to correctional improvement, and it has been most vocal in this respect during the past year. Reporters should be invited to look over our programs, our activities, and our facilities. *They ought to be able to talk to any of our clients.* Sometimes they won't be told the truth. Sometimes they will be misled. But in time, as they gain understanding, they will be able to do a better job of separating fact from fiction." Sigler, *New Partnership in Corrections*, 12 CrL 2042, 2043 (10/11/72) (emphasis added).

It is thus no accident that almost all commentators similarly oppose the kind of ban imposed by defendants. See, *e.g.*, Corrections Standard 2.17, National Advisory Commission on Criminal Justice Standards and Goals (1973), and Commentary, *id.* at 68; Recommendations of the Association of State Correctional Administrators reported in Comment, *A Prisoner-Press Interview Right*, 11 Am. Cr. L. Rev. 273, 288 n. 73 (1972); NCCD, Model Act for the Protection of Rights of Prisoners § 7, discussed in *Washington Post* Finding of Fact 58; Model Rules and Regulations ID-10, pp. 75-76 (West Pub. Co. 1973) (adopted in Massachusetts).

For this reason, almost all the cases that have recently grappled with this problem have come out the same way. See, *e.g.*, *Washington Post Co. v. Kleindienst, supra; Globe Pub. Co. v. Bork, supra; Houston Chronicle Pub. Co. v. Kleindienst, supra; Burnham v. Oswald*, 342 F. Supp. 880. Only *Mitford v. Pickett*, 363 F. Supp. 975 (E. D. Ill. 1973) and *Smith v. Bounds*, ____ F. Supp. ____, Civ. 2914 (N. D. N. Car. 3/14/72), *aff'd*, 73-1658 (4th Cir. 6/8/73) seem to uphold a total ban.* As noted, *Seattle-Tacoma Newspaper Guild v. Parker*, 480 F.2d 1062 (9th Cir. 1973) was explicitly limited to a maximum security institution like McNeil Island, *id.* at 1067, see the opinion below in App. at 46, and *Washington Post Co. v. Kleindienst*, slip op. 21 n.21; and *Seale v. Manson*, 326 F.Supp. 1275, 1283 (D. Conn. 1971) involved a specific application of a flexible rule, as did *Yarish v. Nelson*, 27 Cal. App. 3d 893, 104 Cal. Rptr. 205 (Ct. App. 1 1972).

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* As the inmate-appellees in No. 73-754 noted in their Motion to Affirm or Dismiss, the North Carolina system shortly thereafter decided to permit press-inmate interviews, despite the decision in their favor.

C. *Branzburg v. Hayes* does not mandate a different result.

The district court, following *Seattle-Tacoma Newspaper Guild v. Parker,* relied on *Branzburg v. Hayes, supra.* Such reliance was unwarranted. Note, *Public and Press Access Rights to Prisoners after Branzburg and Mandel,* 82 YALE L. J. 1337, 1342 n. 36 (1973). *Branzburg* explicitly denied that "newsgathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated." 408 U. S. at 681. At the close of the opinion, the Court reiterated that "news gathering is not without its First Amendment protections." *Id.* at 707; see Note, 82 YALE L. J. at 1346. Mr. Justice Powell, in his concurrence, drove the point home by stressing the First Amendment's protection for news-gathering. *Id.* at 709. See also the views of Mr. Justice Stewart, *id.* at 728 n. 4 and 727; and the views of Mr. Justice Douglas, *id.* at 715.

Branzburg did not even address itself to the kind of problem at issue here. As the Court noted not once, but several times, the sole issue in the case was "whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment." *Id.* at 667; see also *id.* at 682 ("the *sole* issue before us is the obligation of reporters as other citizens to respond to grand jury subpoenas relevant to an investigation into the commission of crime" [emphasis added]). And it refused to create such a privilege where the effect of such denial on newsgatherings was "uncertain" and "speculative," *id.* at 690, 694; as will be argued below, the effect of the ban here is very great. Moreover, the benefit to newsgathering from the privilege claimed in *Branzburg* was deemed equally uncertain. *Id.* at

695. And most importantly, the countervailing interest was one of those most consistently protected by this Court—the power of the grand jury to seek out crime. See *United States v. Calandra*, ____ U. S. ____, 14 CrL 3061, 3063 (Jan. 8, 1974). Here, however, the district court found no such countervailing interest.*

Moreover, in *Branzburg*, this Court noted that its "conclusion itself involves no restraint on what newspapers may publish or on the *type or quality* of information reporters may seek to acquire. . . ." 408 U. S. at 691 (emphasis added). Yet, as the district court found, the "type or quality" of information available to the press will be sharply diminished if face-to-face interviews are not allowed, App. 37-39, and many other courts have similarly concluded. And although this case does not involve a direct prior "restraint on what newspapers may publish," compare *Near v. Minnesota*, 283 U. S. 697 (1931), defendant's ban has the same effect by choking off one of the very few reliable and useful sources of a particular kind of news. As was said in the *Washington Post* case, "excessive limitations on the ability to gather information would render the freedom to publish a hollow guarantee." Slip op. 8. See also *Houston Chronicle Pub. Co. v. Kleindienst*, 364 F. Supp. at 730. Compare *Schneider v. State*, 308 U. S. 147 (1939).

This latter problem is aggravated by the fact that the defendants and other California prison administrators have steady and easy access to the press. Philip Guthry, the

* Non-prison cases interpreting *Branzburg* as limited to grand jury situations where the consequential burden is slight include *Baker v. F&F Investment Co.*, 470 F.2d 778 2d Cir. 1972); *U.S. v. Liddy*, 478 F.2d 586 (D.C. Cir. 1972) (Leventhal, J., concurring); *U.S. v. Dickinson*, 465 F.2d 496 (5th Cir. 1972); *Bursey v. U.S.*, 466 F.2d 1059 (9th Cir. 1971); *Cervantes v. Time, Inc.*, 464 F.2d 987, 993 n.10 (8th Cir. 1972); *Stanford Daily v. Zurcher*, 353 F. Supp. 124 (N.D. Cal 1972).

California Information Officer, testified that the "press has virtually unlimited access to employers and administrators." Joint App. 241. He answers hundreds, maybe thousands, of inquiries from the press, generally reflecting not the prisoners' viewpoints, but the administrators'. *Id.* at 252. When a strike recently occurred, there were twenty news inquiries, "but no prisoners were allowed to talk during the course of the strike," *id.* at 261, and the administrators told the newsmen "what's going on." *Ibid.*

This is not to say that reporters should have access everywhere and at all times. Proceedings that are secret or otherwise kept from the general public may be covered by *Branzburg*, see 408 U. S. at 684-85, *cf. Lloyd v. Tanner*, 407 U. S. 551 (1972), but surely not places open to "hundreds" of people daily, with 10,000 visitors a year at San Quentin alone. App. 43.

III. The restriction imposed on the press by § 415.071 is very severe.

The district court concluded that "whatever rights the press may have with respect to interviews with inmates" were sufficiently protected by the rights afforded the prisoners and by the right of random access. App. 7, 8.

As to "random access," each court that has dealt with this problem particularly those that have considered the virtually identical federal rule,* has concluded that random access is inadequate. See cases cited at p. 7, *supra*, especially *Washington Post Co. v. Kleindienst*, slip op. 11-12.

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* Contrary to the district court's unfounded belief that the *Washington Post* case involved a more stringent rule, see App. 35, 36, the federal and California rules are identical, and defendant Procunier so testified in the *Washington Post* case. See Joint App. 288.

Nor will protection for the inmates' rights of expression enable the press to fulfill its newsgathering duties. In the first place, there may be instances where the inmate has no particular interest in seeking out the press because he is indifferent about whether others obtain his information, though he will disclose it if asked. See, *e.g.*, *McMillan v. Carlson, supra* (inmate has information about James Earl Ray's early life).

Even more importantly, many inmates are afraid to take the initiative to seek interviews, to call attention to themselves. This was implicitly confirmed by Mr. Guthry who "never dealt with an instance in which an inmate has asked to be interviewed." Joint App. 248, 258. Warden Nelson responded to an Interrogatory on the subject with "Requests by prisoners for interviews with the media are rare, and some are recalled." Interrog. 4, in Joint App. 53-54; see also the opinion below in App. at 41, 42. And since both the defendants and the court below interpret the court's ruling as requiring the inmate to take the initiative in order for the inmate to exercise his right, see jurisdictional statement in No. 73-754 at 8-9, and pp. 46-47 of the record of Feb. 14, 1973 hearing (Judge Williams' comments), press-inmate interviews will take even more courage on the inmate's part.

Moreover, there are indications that the final regulation will be something like Reg. 72/40, the interim regulation reprinted in Joint App. 104. If so, it will be particularly difficult for the press to obtain information, for that regulation is geared entirely to an inmate's right to expression. Thus, interviews are allowed only once every six months; no interviews are allowed if the inmate is in solitary confinement (in order to punish him); only the inmate can appeal a disapproval of an interview, thus requiring him to over-

come a fear of reprisals. See generally the November 1972 affidavit of defendant Procunier, printed in Joint App. at 122-31.

Nor will mail help very much, as so many courts have found. Many inmates have poor literacy or other language problems, and have great difficulty expressing themselves on paper. Indeed, virtually all the cases striking down press access rules have found that face-to-face interviews are essential, as did the district court herein. App. 35-36. See also, *Washington Post Co. v. Kleindienst*, slip op. 11; *Burnham v. Oswald*, 342 F. Supp. 885 ("there are many prison situations which can only be explored fully and accurately by face-to-face interview"); findings 20-28 to *Washington Post Co. v. Kleindienst*, 357 F. Supp. at 786, reprinted in App. C. And in another context, this Court has come to the same conclusion, *Kleindienst v. Mandel*, 408 U. S. at 765.

IV. Defendants have presented no justification that meets the heavy burden imposed on any significant restriction on First Amendment's freedoms.

Because the district court's dismissal of the press-appellants' claims was based almost entirely on its construction of *Branzburg*, it explored virtually no penological or other relevant factual considerations. Those considerations are no different, however, from those so carefully and painstakingly analyzed by the district court in its discussion of the inmates' rights, and totally rejected; the anomalousness of the district court's divergent rulings in this case has been noted and criticized. Note, *Public and Press Rights of Access to Prisoners After Branzburg and Mandel*, 82 YALE L. J. 1337, 1342 n. 36 (1973).

Because of the applicability of defendants' arguments on this score to the press-appellants' claims, those arguments will be analyzed here, though relatively briefly since they will be treated extensively in No. 73-754.

A. Defendants carry a heavy burden of showing that they have adopted the least drastic alternative in order to meet a compelling state interest.

It seems almost beyond dispute that First Amendment freedoms can be restricted only if there is a compelling state interest involved, and the least drastic alternative has been chosen. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *United States v. O'Brien*, 391 U.S. 367, 377 (1968). And limitation must be on "an individualized basis, not by means of broad classifications." *Chicago Police Dept. v. Mosley*, 408 U.S. 92, 101 (1972); *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963); *Washington Post Co. v. Kleindienst*, slip op. 13, 14, 21; *Dorfman v. Meiszner*, 430 F.2d 558, 561-62 (7th Cir. 1971). Here, the most drastic alternative has been chosen, and on the broadest of classifications.

Indeed, the total and universal ban adopted by defendants in order to deal with a small number of problem situations raises serious problems of overbreadth. It ignores the requirement laid down by this Court that "justifiable government goals may not be achieved by unduly broad means having an unnecessary impact on protected rights of speech, press, or association." *Branzburg v. Hayes*, 408 U.S. at 680-81. As the Court pointed out in *N.A.A.C.P. v. Button*, "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching out most precious freedoms." 371 U.S. at 438. See Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970). Compare *Schneider v. State*, *supra*.

Defendants apparently plan to argue that the appropriate test is the "rational classification" criterion. But as the Second Circuit said in *Sostre v. McGinnis*, 442 F.2d 178, 199 (2d Cir. 1971), *cert. denied, sub nom. Oswald v. Sostre*, 405 U.S. 978 (1972), "the values commonly associated with free expression . . . that we esteem in a free society do not turn to dross in an unfree one." And virtually all other courts have held similarly. See, *e.g., Nolan v. Fitzpatrick*, 457 F.2d 451 (1st Cir. 1971); *Sobell v. Reed*, 327 F. Supp. 1294, 1303-04 (S.D.N.Y. 1971). As the court below recognized, the existence of tensions in prison does not change the applicable standard—it is only that in some circumstances that standard is easier to meet. Compare *Banks v. Havener*, 234 F. Supp. 27 (E.D. Va. 1964). Indeed, in *New York Times Co. v. United States*, 403 U.S. 713 (1971), two Justices thought there would be some adverse effect on national security from the publication, but they nevertheless voted to strike down the prior restraint. See 403 U.S. at 730, 731 (Stewart and White, JJ., concurring). See also *United States v. Robel*, 389 U.S. 258, 263-64 (1968).

The burden of justification is even heavier where what is at issue are not *prisoners'* rights, where a "punitive regimen" may be relevant, see *Brown v. Peyton*, 437 F.2d 1228, 1231 (4th Cir. 1971), *Nolan v. Fitzpatrick*, 451 F.2d at 550, but the *community's* right to know. See *Washington Post Co. v. Kleindienst*, slip op. 7-8.

And finally, even if a "rational basis" standard is appropriate, such a basis has not been made out, as Judge Hamlin found below.

B. The district court properly found no rational or other valid basis for defendants' total, inflexible ban on press interviews with specific individual inmates.

It should first be re-emphasized exactly how broad and inflexible defendants' ban is. Defendant Procunier operates a penal system involving 21,000 prisoners and containing twelve camps, minimum security institutions, and work-release programs, as well as highly secured prisons. See *Juvenile and Adult Correctional Institutions and Agencies* (ACA 1973). He permits no interviews with specific individual inmates no matter how well-behaved and obscure they are, no matter where they are located, no matter what the reasons for the interview, no matter whether they are on work-release programs—in short, no matter how non-existent the security or other problem that particular interview may post.*

Surely, one would be hard put to find a *more* drastic alternative, one which draws a *broader* and less discriminating classification. Compare *Chicago Police Dept. v. Mosley, supra.*

The best evidence for the lack of need for such a blunderbuss approach comes from defendant Procunier himself, in his *Washington Post* testimony already quoted at p. 15 above. And the fact that, as Judge Gesell found, in the *Washington Post* case, so many other jurisdictions apparently get along easily with more flexible rules, see *Washington Post* Findings 52-54, makes it even clearer how unnecessary is such an all-inclusive bar.

* It will be recalled that the district court found that none of the plaintiffs herein posed any security problem. App. 31.

Defendants present three justifications, all of which the district court rejected in connection with the inmates' rights after considering the voluminous affidavits, interrogatories and live testimony.

1. *Administrative convenience.*

All courts that have dealt with this issue have found prison officials' claims unfounded. In California, particularly, where there are thousands of visitors annually to San Quentin alone, the additional burden of a few press interviews seems negligible.* See especially Findings of Fact 48-50, 52-60 in *Washington Post Co. v. Kleindienst.*

2. *Rehabiliation.*

There was no showing whatsoever how rehabilitation could be hindered by such interviews.

3. *Security.*

Security is obviously a compelling interest, and press-appellants do not minimize it. But a showing must be made of a meaningful connection between press-inmate interviews and security, and that the least drastic alternative has been chosen.

Defendants tried to develop a theory that somehow prison interviews would increase an inmate's notoriety and make discipline more difficult. No evidence was presented in support of this, and it certainly could not be a justification for an across-the-board proscription of all interviews. Almost every court that has dealt with this

* By coincidence, counsel conducted a survey of State policies on press access to prisons in 1971. The California response by Mr. Guthrie (apparently the same person as Mr. "Guthry" referred to above) indicates no administrative problems whatsoever. A copy of that response is reprinted in the Appendix to this brief.

claim has found that it does not justify an absolute and universal ban. See *e.g., Washington Post Co. v. Kleindienst,* slip op. 14-17. The one example cited by defendants —the George Jackson incident—was revealed in testimony to have had nothing to do with press interviews. See App. ——. Mr. Guthry admitted on cross examination that the link between a few press interviews and "celebrity" status was tenuous, Joint App. 253, and that in any event, it was a manageable problem by controlling the number of interviews. *Id.* at 254.

Indeed, defendant Nelson declared in Interrogatory Answer 11 that "an interview . . . is a security threat only when the inmate is personally dangerous or such interviews are so numerous that the visiting room is crowded with dangerous and/or escape-prone inmates." Joint Appendix 55.* And, it must be recalled, the district court found that *these* plaintiffs represented no security threat at all.

Surely if real questions as to the national security do not automatically eliminate First Amendment protections, *New York Times Co. v. United States,* 403 U. S. at 730, 731; *United States v. Robel,* 389 U. S. 258, 263-64 (1968), invocation of prison security must be even more solidly supported.

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* There is one particularly revealing indication of how flimsy this argument is. At one point, defendants' counsel cited an interview with Charles Manson as one which would not be permitted on a specific basis. Joint App. 238. But when interviews were allowed with a group of prisoners on death row, Manson was in fact interviewed. Joint App. 243. How much dangerous "big wheel" publicity was avoided by allowing the Manson interview to take place on a "random basis" but not on an individual one? In short, defendants' position is not only internally consistent, compare *Globe Newspaper Co. v. Bork, supra,* (memo op. 11), but makes little sense in terms of defendants' own reasons for it.

In sum, defendants' arguments rest solely on unsupported surmise and conjecture. But if "the First Amendment tolerates absolutely no prior judicial restraint of the press predicated upon surmise or conjecture that untoward consequents may result," *New York Times v. United States*, 403 U. S. at 725-26 (Brennan, J., concurring) it especially tolerates no such poorly grounded and overbroad restraint by prison administrators who "are not charged by law with the responsibility for interpreting and applying constitutional provisions, and . . . [who] are not always disinterested persons in the resolution of prison problems." *Brown v. Peyton*, 437 F.2d at 1232. See also *Goodwin v. Oswald*, 462 F.2d 1237, 1244 (2d Cir., 1972); *Nolan v. Fitzpatrick*, 451 F.2d at 549; *Fortune Society v. McGinnis*, 319 F. Supp. 904 (S.D.N.Y. 1970); *Davis v. Lindsay*, 321 F. Supp. 1134, 1138 (S.D.N.Y. 1970); *Sobell v. Reed, supra.*

Conclusion

In 1787, Thomas Jefferson wrote to Edward Carrington that the way to prevent errors by a free people "is to give them full information of their affairs thro' the channel of the public papers, and to contrive that those papers shall penetrate the whole mass of the people."* That is still our faith.

Defendants' policy violates that fundamental belief. To affirm the district court's ruling, especially in light of the district court's rejection of defendant's justification, is not merely to deny the press a preferred position, but to discriminate against it. Neither a free society nor any hopes for prison reform can survive such a ruling.

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* XII Papers of Thomas Jefferson (Boyd ed.) 48-49.

This Court should rule that press access to specific individual inmates is to be permitted unless it is shown that the particular interview presents a clear and present danger to a valid penological interest. The district court's decision in favor of defendants should be reversed.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BOOKER T. HILLERY, JR., *et al.*,
Plaintiffs,

vs.

RAYMOND K. PROCUNIER, *et al.*,
Defendants.

No. C-71-2150 SW

Memorandum of Opinion

(Filed August 16, 1973.)

Before: HAMLIN, Circuit Judge, EAST and WILLIAMS District Judges:

WILLIAMS, District Judge:

At issue here is the constitutionality of § 415.071 of the California Department of Corrections Manual, which provides:

> "Press and other media interviews with specific individual inmates will not be permitted."

I.

Plaintiffs seek injunctive and declaratory relief under the Civil Rights Act, 42 U.S.C. § 1983. Jurisdiction is conferred upon this court under Title 28 U.S.C. §§ 1343(3), 1343(4) and 2201.

II.

Plaintiffs Hillery, Spain, Bly and Guile are prisoners at San Quentin State Penitentiary. Editors of ***Earth Magazine*** wish to interview Hillery. Plaintiffs Pell, Sebal, and Jacobs are, respectively, free lance, newspaper, and television journalists each of whom wishes to interview one of the three other inmate plaintiffs. Each of the inmate plaintiffs has affirmatively consented to an interview; each request was denied by the Warden on the basis of § 415.071. None of the prisoner plaintiffs has been alleged by the defendants to have presented disciplinary problems; nor have defendants alleged a proclivity of these media plaintiffs to create security risks.

Defendant Procunier is the Director of the State Department of Corrections. Defendant Nelson is the Warden of San Quentin; defendants Park and O'Brien are Associate Wardens.

III.

This case has its humble origins in a complaint drafted by a lay prisoner serving time at San Quentin. Shortly after the action was filed the court appointed counsel and the complaint was amended in March 1972 to add several other prisoners and media representatives as plaintiffs. The State filed a motion to dismiss for failure to state a claim upon which relief can be granted. The matter was thoroughly briefed and the court, on September 29, 1972, preliminarily enjoined the enforcement of § 415.071 and ordered defendants to submit proposed revisions to the regulations comporting to the standards set forth in the court's memorandum of decision. The State immediately moved for vacation of the order for lack of jurisdiction,

arguing, for the first time since the initiation of the lawsuit, that since the regulation in question was applied by the Department of Corrections uniformly throughout the entire state penal system, the matter must be adjudicated by a three-judge court. Title 28 U.S.C. § 2281; *Gilmore v. Lynch*, 400 F.2d 228 (9th Cir. 1968), *cert. denied*, 393 U.S. 1092 (1969).[1]

Plaintiffs conceded that given the scope of application of § 415.071 the injunction was invalid. They urged the court to grant a temporary restraining order pending a final disposition by the three-judge panel. Upon affidavits submitted on behalf of the plaintiffs the court found that plaintiffs would suffer irreparable harm if the relief were not granted and issued the temporary restraining order under the same terms as provided in the original injunction. Title 28 U.S.C. § 2284(3).

Interim regulations were formulated by the prison officials and implemented in November 1972. None of the sought-after interviews took place, however, and plaintiffs subsequently moved the court to hold defendants in contempt for failure to comply with the order. Defendants moved the order be dissolved. Both motions were denied in light of the impending hearing by this court.

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[1] The litigation had proceeded for almost a year with the parties' and the court's attention focused on the interview practice at San Quentin, where all of the inmate plaintiffs are detained, the interviews sought by the media plaintiffs were to take place, and all the defendants, save Mr. Procunier, were employed. The State in its moving papers, explained that it did not feel obliged to bring to the attention of the court the statewide nature of the regulation or the jurisdictional point beforehand because it was of the opinion that the issue presented in the lawsuit was insubstantial—a somewhat curious appraisal given the court's obvious concern over the constitutional questions presented by the complaint, manifested, in part, by appointment of counsel for plaintiffs.

Appendix A—Memorandum of Opinion

The panel convened February 22 to determine the constitutionality of § 415.071 as originally worded. The instant ruling is based on the arguments and testimony offered on that date and the memoranda of law and affidavits submitted by the parties.

IV.

Prior to the implementation of § 415.071 the Department operated upon a laissez-faire policy with respect to press interviews with inmates. Until the late 1960s such interviews were relatively infrequent and resulted in little burden upon or danger to the institutions. With the rise of manifested discontent within the prisons and the consequent arousal of public concern and curiosity, however, the number of requests for media interviews increased substantially. The Department accommodated this influx despite the accompanying increased demands on its personnel and facilities. But beyond administrative hardships, the escalation of media access and exposure also created, in the Department's opinion, the phenomenon of the "prison celebrity" or "big wheel"—the prisoner who, through his writings and media coverage, gained a certain notoriety both outside and inside the institution. The influence of the "celebrity" over other inmates is looked upon by the Department as an added potential threat to the security and discipline within the prison.

It was against this background that the tragic events of August 21, 1971 took place. During an escape attempt at San Quentin three staff members and two inmates were killed. This was viewed by the officials as the climax of mounting disciplinary problems caused, in part, by its liberal posture with regard to press interviews, and on August 23 § 415.071 was adopted to mitigate the problem.

The regulation does not effect an absolute ban on all media interviews with inmates. The practice under the rule is to allow media representatives to enter the prison and, aided by the Warden, select at random interviewees from the prison population.[2] Thus, media representatives are able to interview an inmate, but unable to select a particular inmate. Similarly, a prisoner who happens to be randomly selected can express himself personally to the newsman or journalist, but cannot initiate an interview himself.[3]

V.

The media plaintiffs herein and amicus curiae[4] argue that § 415.071 is violative of not only the prisoners' First Amendment rights, but also the press'. The court disagrees. It has been made clear in recent decisions by the Supreme Court that the press enjoys no greater right to access to news sources than the average citizen. In *Branzburg v. Hayes*, 408 U.S. 665 (1971) the Court held that newsmen were not immune to grand jury solicitation of or information derived from the newsman's confidential sources. While the facts of that case are substantially different than those presented here, the Court unequivocally dismissed any notion that the First Amendment bestowed upon newsmen special news-gathering privileges. Reviewing past decisions on the subject[5] the Court observed:

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[2] It is not clear whether selection is made from all segments of the population or whether it is limited to those sections where visitors otherwise have access.

[3] Prisoners engaged in writing for publications are authorized to meet with their publishers' representatives under a separate regulation covering *business* activities of prisoners.

[4] American Civil Liberties Union.

[5] *Inter alia, Zemel v. Rusk*, 381 U.S. 1 (1965); *Shephard v. Maxwell*, 384 U.S. 333 (1966).

> "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." 408 U.S. at 684.

As in *Branzburg*, the present case ". . . involve[s] no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold." 408 U.S. at 681.

This rationale was followed by the Ninth Circuit in the recent decision in *Seattle-Tacoma Newspaper Guild, Local #82 v. Parker*, Civ. No. 72-2330 (June 7, 1973). In that case media plaintiffs and prisoner intervenors challeged a regulation implemented at McNeil Island Federal Penitentiary which prohibited press interviews with willing prisoners. With respect to the First Amendment claims of the media representatives, the court held that under *Zemel v. Rusk, supra*, the "'. . . [t]he right to speak and publish does not carry with it the unrestrained right to gather information'" (Slip opinion at 7), and that the "disruptive influences" at McNeil "outweigh the uncertain burden on news reporting that allegedly results from prohibiting prisoner interviews." Slip opinion at 7.

The *Seattle-Tacoma* ruling with respect to the media claims controls here. We note in passing however, that cases cited by plaintiffs emanating from other jurisdictions apparently arriving at an opposite conclusion are distinguishable. In *Washington Post v. Kleindienst*, Civ. 467-72 (D.D.C. April 9, 1972), 40 U.S.L.W. 2683[6] for example, the

[6] In its first Washington Post rulings (hereinafter "Washington Post I") the district court enjoined defendants' enforcement of a regulation banning personal interviews between press representatives and

(Footnote continued on following page)

regulation held unconstitutional barred *all* interviews with inmates at federal penitentiaries in Connecticut and Pennsylvania. The court held that "[a] continuing flat ban against press interviews of any prisoner, at any time, in any institution, is on its face arbitrary." *Washington Post I* at p. 5. In that context, it is apparent the press was not being granted a *special* right of access to prisoners, but simply *some* access. Even under § 415.071 as it stood before today's ruling the press was given the freedom to enter the California institutions and interview at random, and it is the conclusion of this court that the even broader access afforded prisoners by today's ruling sufficiently protects whatever rights the press may have with respect to interviews with inmates.

VI.

We turn next to the prisoners' rights as they are affected by § 415.071. Case law dealing with the constitutionality of prison regulations has proliferated in recent years. From those decisions the court discerns three axioms within

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(Footnote continued from preceding page)
inmates. Defendants secured a stay of that ruling by the Supreme Court *Kleindienst v. Washington Post Co.*, 406 U.S. 912 (1972) and appealed the decision to the court of appeals. That court remanded the case to the district court for reconsideration in light of *Branzburg v. Hayes, supra,* and for further evidentiary proceedings to examine, among other issues, the necessity of personal interviews and the legitimacy of the "big wheel" theory. *Washington Post v. Kleindienst,* Civ. No. 72-1362 (D.C. Cir., September 6, 1972). The district court held further hearings and issued a Supplemental Memorandum, confirming its earlier rulings and specifically finding that personal interviews are essential to the exercise of both the prisoners' and medias' First Amendment rights, that the "big wheel" theory was unsubstantiated and that *Branzburg* was inapplicable. *Washington Post Co. v. Kleindienst,* Civ. 467-72 (D.D.C. December 19, 1972) (hereinafter "Washington Post II").

whose bounds the current analysis must take place. 1) It is clear that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston*, 334 U.S. 266 (1948)[7] 2) Further, prison officials are properly given a great degree of discretion in the administration of appeal institutions. *Stroud v. Swope*, 187 F.2d 850 (9th Cir. 1951); *Seale v. Manson*, 326 F.Supp. 1375 (D. Conn. 1971) and cases cited at 1379. 3) But it is equally clear that a prisoner does not lose all constitutional rights with the slamming of the jailhouse door (*Gilmore v. Lynch*, 319 F.Supp. 105 (N.D. Cal. 1970), *aff'd.* 400 F.2d 1092, *supra; Seale v. Manson, supra*, at 1379), particularly where the prisoner's First Amendment rights are imperiled. *Nolan v. Fitzpatrick*, 326 F.Supp. 209 (D. Mass. 1971), *reversed on other grounds*, 451 F.2d 545 (1st Cir. 1971), *Burnham v. Oswald*, 342 F.Supp. 880 (W.D.N.Y. 1972), *Washington Post Co. v. Kleindienst I, supra.*

That § 415.071 abridges, to some degree, plaintiffs' freedom of expression is certain. But even in the "outside world" certain limitations on speech are constitutionally permissible. See, *Kovacs v. Cooper*, 336 U.S. 77 (1949). In determining whether this section is unconstitutional the court must first discern and then balance the prisoners' interests against those of the State.

Defendants argue that plaintiffs' First Amendment rights are sufficiently protected by the press regulation as it stands, in that *written* communications to the press remain

[7] Holding, *inter alia*, a prisoner is not entitled to personally appear at the hearing of his habeas corpus petition.

unobstructed and personal interviews are permitted, albeit on the random basis described above. But the random selection conditions a prisoner's exercise of his right to express himself on the luck of the draw. And, under this method, the prisoner with the most to say, may, with bad luck, never be able to say it effectively. The court is of the opinion that face-to-face interviews with media representatives are a vital element in the prisoners' rights under the First Amendment. Other courts have come to the same conclusion. In *Burnham v. Oswald, supra*, the court dealt with facts almost identical to those presented here. There, inmates at Attica State Prison and newsmen challenged prison regulations that were adopted shortly after the riot of September 9-13, 1971. The regulations permitted press interviews of inmates at the discretion of the Superintendent, who was authorized to deny a request if he determined it would adversely affect the "integrity" of the institution. "Integrity" was left undefined by the regulations. The court held that the regulations granted the Superintendent too broad a discretion in his determination of whether an interview could be held.

> "The court holds that an interview with a consenting inmate must be permitted unless it is determined that to hold the interview would present a clear and present danger of breach of the security, discipline or orderly administration of the institution, [citations omitted], or that the inmate had clearly abused his right of access to the press." 342 F.Supp. at 887.

A significant factor in the court's ruling was the finding that:

> "[T]here are many inmates who would be deprived of their right to communicate if they could only correspond but not meet personally with newsmen. Fur-

> ther, there are many prison situations which can only be explored fully and accurately by a face-to-face interview." 342 F.Supp. at 885.[8]

A similar holding was enunciated in *Washington Post Co. v. Kleindienst* where the court was persuaded by the plaintiffs' argument that "[c]ommunication by correspondence is . . . too impersonal and timeconsuming. In order to write reliable stories, . . . there is a need to observe demeanor, to probe by questioning and to overcome the barrier of semi-illiteracy and suspicion that may inhibit inmates when they write. Prison tours and related conversations with individuals or groups are . . . to hit-and-miss, too limited, too casual, too unproductive to enable a reporter to probe a given situation." *Washington Post I*, at p. 5; *Washington Post II*, at p. 1. See, also, Comment, A Prisoner-Press Interview Right, 11 Am.Crim. L.R. 273 (1972). The court fails to see how either of the two virtues of personal interviews—assiting inarticulate inmates express themselves clearly and verifying their stories—can in themselves be objected to by the authorities.

Which brings us to an evaluation of the prison's interest in the preservation of § 415.071. It is a fundamental precept of constitutional law that when a state restricts a First Amendment right, especially when that restriction is imposed prior to publication, it must be able to show a *compelling* interest advanced by that regulation. *New York Times Co. v. United States*, 403 U.S. 713 (1971), *Edwards v. South Carolina*, 372 U.S. 229 (1962). This standard applies in the prison context (*Nolan v. Fitzpatrick*, *supra*,

[8] But see *Smith v. Bounds*, Civ. No. 2914 (E.D.N.C. March 10, 1972) where it was held that written communication to the press sufficiently preserved the inmates' rights.

Burnham v. Oswald, supra, at 885, *Fortune Society v. McGinnis,* 319 F.Supp. 904 (S.D.N.Y. 1970), *Seale v. Manson, supra, Cf. Martinez v. Procunier,* C-71-543 (N.D. Cal., Feb. 2, 1973) (three-judge court), at pp. 7-8), despite language used by other courts, in dealing with similar cases, that at first glance appears to indicate a lesser standard should be employed. Defendants cite *Carothers v. Follette,* 314 F.Supp. 1014 (S.D.N.Y. 1970) for the proposition that a prisoner's right of expression can be limited if the regulation is related both "reasonably . . . and necessarily . . . to the advancement of some justifiable purpose of imprisonment." 314 F.Supp. at 1024. The court believes that this rule is not only consistent with the "compelling interest" test, it is its concomitant. That is, not only must the state show a compelling interest in limiting the prisoners' rights, but the *method* it chooses to effect the limitation must be related—"reasonably and necessarily" —to the end sought.

To the extent that *Carothers* can be read as qualifying otherwise broad First Amendment liberties in the prison context, this court agrees that, while the stricter standard applies, the State can generally illustrate a compelling interest more readily than it can when defending regulations affecting the free population. This is so because prisons, by their very nature, are institutions inhabited by persons who have abused various liberties, some of whom have illustrated a propensity for violence, who are forced to live in close confines. There is a lower threshold of "clear and present danger" in these institutions. But while prison discipline, inmate safety, and rehabilitation are indisputably "compelling state interests" (See *Carothers, supra,* at 1024), regulations advancing those interests must be

tailored so as not to unnecessarily restrict First Amendment rights.

Turning to the instant regulation, the state has offered four grounds upon which it attempts to defend § 415.071. None are sufficiently substantiated by fact to sustain the defense.

A.

Administrative Burden

The state anticipates that too wide an access by the press to inmates will result in an intolerable demand on facilities and man-hours. Defendants point to one history in which a prisoner was interviewed sixty-six times in a six-month period. On closer examination, however, this "example" was not only revealed to be a clear exception to the then prevailing practice but appears to have been totally media-initiated. In fact, the number of requests *by prisoners* for press interviews was minimal, as indicated in Warden Nelson's Answers to Interrogatories (filed April 10, 1972):

> "4. Over the past year (Feb. 20, 1971-Feb. 20, 1972) how many prisoners have requested interviews with outside media?"
>
> • • •
>
> "A: We have no record of this information. *Requests by prisoners for interviews with media are rare, and none are recalled.*" (Emphasis added).

Additionally, the prison maintained no records as to the number of interviews initiated by media personnel although, presumably, such requests were somewhat more frequent. And insofar as the prisoner's right to interview

is concerned, the Warden's response to Interrogatory #4 dispels any notion that prisoner-requested interviews have presented an extraordinary administrative burden. In short, the present regulation attempts to obviate an administrative problem that does not exist, and is therefore neither reasonably nor necessarily related to a legitimate state interest.

By holding that the State has made an insufficient factual showing of administrative burden, the court does not imply that reasonable limitations as to the time, place, and manner of such interviews cannot be imposed. On the contrary, it is obvious that regulations governing the number of interviews each prisoner is to be allowed, the length of such interviews, and assessment of reasonable costs to reimburse the administration for *extraordinary* services would be permissible. See *Seale v. Manson, supra*, at 1383.

B.

Security

Much of the State's argument with respect to the security factor of § 415.071 hangs on the "big wheel" theory discussed in Subparagraph D *infra*. The court takes the defendants to argue, additionally, that the mere presence of large number of newsmen endangers the security of the prisons. It might first be noted that newsmen ". . . are not inherently security risks." *Nolan v. Fitzpatrick, supra*, at 213. And put in the proper perspective, it becomes apparent that the interview program envisioned by the plaintiffs would be but one relatively small enterprise among a myriad of others. Mr. Philip Guthrie, Information Officer for the Department of Corrections, testified at

the hearing that "hundreds" of private citizens visit California penal institutions every day. As many as 10,000 persons visit San Quentin every year, participating in events ranging from guided tours to art exhibits to bridge tournaments. Similarly, friends and relatives visit inmates regularly and inmates have virtually unlimited access to legal counsel.

The defendants have made no specific showing as to how news media personnel have jeopardized security in the past;[9] and they have conspicuously failed even to allege that any of the inmate plaintiffs have shown propensities for violence or trouble-making, or that they in any way pose a threat to prison security.

Prison security is patently a legitimate concern of the defendants, but § 415.071, covering as it does all interviews with specific inmates, is too drastic a means by which to achieve it. As mentioned above, the number of interviews may be reasonably limited so as to assure adequate supervision by correctional officers. Likewise, the prisons officials may require interviews to submit to reasonable searches for contraband, escape plans, or weapons as a precondition to the interview. Finally, if the authorities have good cause to believe that a *particular* interview would pose a clear and present danger to prison security, it may be denied.

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[9] The events of August 21, described above, were allegedly sparked by an inmate being given a weapon by an *attorney*.

C.

Rehabilitation

The State offered little more than vague speculation as to how § 415.071 advances the rehabilitative programs in California prisons and has thus failed to carry its burden of justifying the section on this ground.

D.

The "Big Wheel" Theory

Defendants' principal argument in defense of § 415.071 rests on the "Big Wheel" or "celebrity" theory, which states that by gaining notoriety through the press, a particular prisoner oftentimes also gains the respect of and an influence over his fellow inmates. This understandably would have several undesirable effects. The elevation of individual prisoners to "celebrity" status is detrimental to the Department's disciplinary efforts, which are founded on the policy of treating all prisoners equally, giving no single prisoner specific privileges with which he might use to obtain an advantage over others. When an individual prisoner achieves a sense of special status he is able, defendants contend, to induce other inmates to combine and engage in behavior they otherwise would not exhibit. When two or more rival "big wheels" rise to power, a situation not unlike street gang warfare can result, leading to large scale intimidation, coercion and violence.

The spectre of such a state of affairs is indeed alarming. And this court entertains no doubt that violence exists in correctional institutions in California or that the Department's task of reducing violence is an exceedingly difficult one. The question here, however, is whether § 415.071

is reasonably and necessarily related to that task, and the court must conclude that the "big wheel" theory, in the end, has been shown by defendants, *in this particular case,* to be little more than that—a theory. The events out of which § 415.071 emanated and by which the Department has attempted to justify the rule—the August 21 incident—serve to illustrate the inapplicability of the theory in this case. One of the prisoners who was killed that day had been interviewed sixty-six times in a six-month period and had published a book composed of letters he had written to members of his family and his attorney which, in substantial part, were critical of society in general and prison administration in particular. Mr. Guthrie described the prisoner as a "big wheel" and stated he believed the August 21 violence arose, in part, out of the theretofore liberal interview policy. However, when questioned further he admitted that the prisoner has in fact only a limited reputation outside prison and had not achieved "celebrity" status within it prior to August 21. Such status was attained only *after* his death. Mr. Guthrie also testified that between 1970 and the date of the hearing ten professional employees and twenty inmates were murdered in California correctional institutions and that in his opinion this violence can be attributed to the liberal interview policy and the influence of the "big wheels." But when asked to explain the nature of the connection between interviews and the violence neither Mr. Guthrie in his testimony, nor defense counsel in his argument, nor Mr. Procunier in his affidavit, could specify facts showing a direct relationship between the two.

Seattle-Tacoma Newspaper Guild, Local #82 v. Parker, supra, is distinguishable with respect to this issue on two

grounds. First, the evidence in Seattle-Tacoma persuasively illustrated that the prison officials had made a "considerable study" of the interview practice and had "concluded that the ban on interviews is necessary to maintain the discipline, custody, and control of the prison." (Slip opinion at 5). As related above, no such showing was made in the present case; on the contrary, defendants' testimony compels a finding that no correlation between press interviews and prison disturbance exists. Secondly, the *Seattle-Tacoma* case dealt with a regulation applicable only to McNeil Island Penitentiary, a maximum security institution designated for detention of selected prisoners who present serious disciplinary and security problems. (Slip opinion at 4). The regulations had been promulgated on the heels of a riot. Here, the challenged regulations are applied at *all* California state penal institutions, from maximum security prisons to work farms, without regard to the various safety and disciplinary characteristics within the system. On this ground alone the regulation is unconstitutionally overbroad.

Seale v. Manson, supra, cited by defendants in support of the theory is also inapposite. There the plaintiff was being held at a Connecticut state prison without bail on serious criminal charges. He challenged a regulation that expressly *permitted* press interviews with specific inmates, but required prior approval by the Warden. On two occasions reporters were denied access to Seale. The court held, and we agree, that the defendants had a legitimate concern in preventing a prisoner from becoming a "wheel" in the institution and that *limiting* (not, as here, totally excluding) interviews with specific inmates was a permissible means by which to achieve that goal. The court notes

that in *Seale* it appears that plaintiff did not disclaim his reputation as a "wheel." In the present case it is not alleged that any of the named plaintiffs have shown a desire to become a celebrity. Mr. Guthrie stated that at the present time he is unable to name a single celebrity throughout the entire California correctional system. The unavoidable conclusion is that no matter how plausible the "big wheel" theory, there is no hard evidence that the danger presented by interviews is either clear or present. The regulations flatly prohibiting such interviews are therefore unconstitutional.

VII.

For the reasons above, it is Adjudged, Ordered and Decreed that:

1. Defendants' motion for dismissal as against the media plaintiffs is Granted.

2. The inmate plaintiffs' motion for summary judgment is Granted.

3. Defendants shall within 30 days present to the court proposed regulations comporting to this decision.

4. Defendants shall permit the interviews sought in this litigation at the earliest practicable time under reasonable conditions and supervision.

Dated: August 16, 1973.

....., *United States Circuit Judge.*

....., *United States District Judge.*

/s/ SPENCER WILLIAMS, *United States District Judge.*

Appendix A—Memorandum of Opinion

Before: HAMLIN, *Circuit Judge*, EAST and WILLIAMS, *District Judges*.

HAMLIN, *Circuit Judge*, concurring:

For the reasons expressed in the majority opinion I concur in the holding therein that section 415.071 is not violative of the rights of the news media.

I concur also in the holding in that opinion that said section is violative of the rights of the plaintiff inmates, but I do so on a different basis.

The majority examines the constitutionality of the regulation prohibiting inmates from requesting interviews with the news media under the "compelling interest" test, applicable to First Amendment restrictions in society at large.

However, in *Seattle-Tacoma Newspaper Guild, Local #82 v. Parker*, ____ F.2d ____ (9 Cir. June 7, 1973), the Ninth Circuit Court of Appeals eschewed the "compelling interest" test as applied to First Amendment restrictions in the prison context, and substituted therefore the "rational basis" analysis:

> "* * * the Bureau of Prisons has given considerable study to the disruptive effects of prisoner interviews on prison administration, and has concluded that the ban on interviews is necessary to maintain the discipline, custody and control of the prison. We are unable to say that that conclusion 'lacks support in any *rational* and constitutionally acceptable concept of a prison system.' (citation omitted). We find that the interview ban is *reasonable action* within the scope of the wide discretion of the prison administrators, and that it does not violate the prisoners' First Amendment rights." (citation omitted.)

APPENDIX B

Letter Dated March 2, 1971

State of California—Human Relations Agency
DEPARTMENT OF CORRECTIONS (SEAL)
Sacramento Ronald Reagan, Governor

March 2, 1971

Mr. Herman Schwartz
Professor of Law
Faculty of Law and Jurisprudence
State University of New York
Buffalo, New York

Dear Mr. Schwartz:

This is in response to your February 26 letter concerning interviews with inmates by representatives of the news media.

It is our general policy that newsmen may interview inmates who are willing to sign a consent form. We do reserve the right to deny interview privileges in specific cases.

In the past ten years there have probably been only two or three cases in which interview requests have been denied. In the case of notorious inmates, we may impose restrictions or limitations to control the workload. For example, interviews may be confined to one a day for a period not to exceed one hour.

I hope this information is helpful to you.

Very truly yours,

PHILIP D. GUTHRIE
PHILIP D. GUTHRIE
Chief Community Relations and Information

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

WASHINGTON POST CO., *et al.*,

Plaintiffs,

vs.

RICHARD KLEINDIENST, *et al.*,

Defendants.

Civil Action No. 467-72.

Plaintiffs' Proposed Findings of Fact and Conclusions of Law

The Court, after full hearing, makes the following findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

* * *

II. The Need for Private, Confidential Interviews

20. The Court finds that the news media and newsmen have a legitimate interest in informing themselves and keeping the public informed about conditions in the institutions and facilities operated by the Federal Bureau of Prisons. Tr. 1, p. 199 (Carlson testimony). Those institutions are generally closed to members of the public, although some persons—such as families and friends of inmates, clergymen, attorneys and Congressmen—are permitted to visit them on a regular basis. Nevertheless, de-

spite the limited access to those institutions, they remain public institutions and their operations are a matter of public concern. Tr. II, p. 127 (Leland testimony); PX 14, p. 21 (Abel deposition); PX 63, p. 24 (Machacek deposition). The fact that federal prison facilities are not generally open to all members of the public only underscores the importance of the role that the news media can play in providing information about the conduct of those institutions. PX 65, pp. 57-60 (Mattick deposition).

21. The Court finds further that the plaintiffs had a legitimate news interest in seeking to develop additional information about the events that occurred at the federal prisons at Lewisburg and Danbury during and following the work stoppages at those two institutions. Specifically, the plaintiffs wished to examine how the work stoppages were resolved without bloodshed, the role played by inmate negotiating committees elected by the inmates in reaching a peaceful settlement of the disputes, and whether the inmate leaders had been punished despite promises of no reprisals. Tr. I, pp. 20, 57 (Bagdikian testimony).

22. The Court finds that the defendants have not imposed a news blackout on events and conditions at federal prisons, as the plaintiffs have alleged in their papers. See, *e.g.*, Complaint, ¶11. The sources of information about federal prisons, which are recited in paragraphs 12-17, *supra*, and which are available to the news media under Policy Statement 1220.1A enable newsmen to obtain some information about events and conditions at federal prisons.

23. The Court also finds, however, that the flat prohibition in Policy Statement 1220.1A of private, individual

interviews between newsmen and inmates willing to be interviewed prevents the news media from developing accurate and effective accounts of conditions and events in federal prisons or grievances of inmates confined to those prisons. Tr. II, pp. 14-44 (Fisher testimony); *id.*, at 122-23 (Leland testimony); PX 14, pp. 13-18 (Abel deposition); PX 63, pp. 18-21 (Machacek deposition).

24. The Court heard uncontradicted testimony from experienced newsmen and journalism educators that the sources of information available under Policy Statement 1220.1A—either separately or in combination—are inadequate to permit the news media to develop accurate and in-depth knowledge of prison conditions or events or prisoner grievances, as the plaintiffs attempted to do in this case.[3]

a. The essential defect in limiting contact between newsmen and particular inmates with grievances or complaints to an exchange of correspondence, as the Policy Statement does, is that the newsman has no opportunity to confront those inmates and evaluate the credibility of the information they wish to convey. Tr. II, p. 43 (Fisher testimony); *id.* at 131 (Leland testimony); PX 14, pp. 23, 32 (Abel deposition). The need for face-to-face confrontation can be of particular importance in the prison context because the inmate who complains by letter may be unknown to the

[3] Except for plaintiff Bagdikian, the newsmen and educators who testified had not had extensive experience in covering or reporting on prison conditions. But there is no basis for assuming that the newsgathering techniques or needs of newsmen covering prisons will differ significantly from those of newsmen in other assignments. PX 14, pp. 16-17 (Abel deposition); PX 63, pp. 20-21 (Machacek deposition).

news media and there would be no independent basis for evaluating his credibility and reliability. Tr. II, p. 131 (Leland testimony).

b. Newsman-inmate communication by correspondence has other serious defects. It can cause delays in developing current information about events or prison conditions. Tr. I, p. 22 (Bagdikian testimony); PX 63, p. 21 (Machacek deposition). Moreover, an exchange of correspondence does not permit a newsman to pursue a line of questioning in depth or to ask follow-up questions on the basis of a particular response. Tr. II, p. 43 (Fisher testimony); *id.* at 130 (Leland testimony); PX 63, pp. 21-22; see Tr. II, p. 14 (Liman testimony). There is also a well-founded suspicion on the part of newsmen that many inmates are not sufficiently literate to communicate effectively by means of the written word. Tr. II, p. 130 (Leland testimony) PX 14, pp. 17-18 (Abel deposition). To the extent that newsmen cannot obtain the views of inmates who are not fully literate, an important source of information is likely to be lost. PX 65, p. 61 (Mattick deposition). The loss would not be mitigated by the opportunity for some inmates to write letters on behalf of others. *Id.*[4]

c. The opportunity offered newsmen to tour federal prisons and to engage in casual conversations with inmates encountered during the tour is not an adequate substitute for private, individual, in-depth interviews. Those con-

[4] The Court also heard testimony that, because mail coming into a federal prison from a newsman is read for illegal content, inmates are likely to be reluctant to be wholly candid in their written exchanges with newsmen for fear of reprisals from prison officials. Tr. I, pp. 16-17, 22-23 (Bagdikian testimony).

versations are limited in terms of their duration, Tr. I, p. 141 (Alldredge testimony); *id.* at 175 (Norton testimony); *id.* at 189-190 (Carlson testimony), and content, Tr. I, p. 47 (Bagdikian testimony); *but cf. id.* at 154, 166 (Alldredge testimony); newsman cannot identify in their stories the inmates with whom they had conversations, Policy Statement, ¶4 (b) (6); Tr. I, p. 24 (Bagdikian testimony); and the conversations may be overheard by prison officials, Tr. I, pp. 53, 54-55 (Bagdikian testimony); *but cf. id.* at 154 (Alldredge testimony). In addition, because the newsman cannot designate in advance the inmates with whom he will converse, the opportunity for casual conversations gives him no access to inmates who are known to have particularized complaints or other particularized information. Tr. II, p. 137 (Leland testimony); PX 63, p. 32 (Machacek deposition).

d. The willingness of federal prison officials to provide the news media with information about events and conditions at those institutions is no substitute for private, individual interviews with inmates. Particularly when a newsman is seeking information relating to inmate complaints about the actions of prison officials or employees, newsmen who testified stated that their experiences make them skeptical that those officials or employees will provide them with objective and balanced information. Tr. II, p. 44 (Fisher testimony); *id.* at 128-129 (Leland testimony); PX 14, pp. 18-19, 30-31 (Abel deposition). That this skepticism is warranted is shown, for example, by the fact that public officials deliberately gave false information to the news media concerning how the hostages died during the Attica prison revolt in September 1971. PX 14, pp. 30-31 (Abel deposi-

tion); PX 63, pp. 5-14, 22-23 (Machacek deposition); PX 9, pp. 455-62 (Attica Report).

e. Plaintiff Bagdikian was given an opportunity at the federal prisons at Lewisburg and Danbury to interview several inmates selected at random from the prison population in a group and out of the hearing of prison officials or employees. Tr. I, pp. 15-18 (Bagdikian testimony). The group interview conducted by Mr. Bagdikian at Lewisburg proved "very unproductive," Tr. I. p. 50 (Bagdikian testimony), because the particular inmates he traveled to Lewisburg to interview were not part of the group and because the inmates who participated admitted they could not speak with candor out of fear that what they said would be reported to prison officials by other inmates and result in reprisals. Tr. I, pp. 17-18 (Bagdikian testimony. The evidence before the Court also shows that group interviews in the prison context are unsatisfactory because, when interviewed in groups, inmates tend to make speeches for the benefit of other inmates rather than relate facts. Indeed, the New York State Special Commission on Attica found that inmates interviewed in a group were far more critical of prison authorities than when they were interviewed in private. Tr. II, pp. 10-11 (Liman testimony).

25. Based on the evidence recited in paragraph 24, *supra*, the Court finds that the sources of information available to the news media under the Policy Statement are inadequate for the development of accurate and effective news account of prison conditions and events and prisoner grievances.

Appendix C—Plaintiffs' Proposed Findings of Fact and Conclusions of Law

26. The Court heard considerable, uncontradicted testimony from experienced newsmen, journalism educators and others concerning the importance of face-to-face private interviews as a news-gathering technique. That evidence showed the following:

a. The opportunity for face-to-face interviews with news sources is critical when the credibility and reliability of the source is unknown to the newsman. Tr. II, p. 32 (Fisher testimony); *id*, at 115-17 (Leland testimony).

b. A private interview with an inmate having a particularized grievance permits the newsman to "study the demeanor of the man, pursue questions at once, watch reactions, [and] confront him with things that seem to be internally inconsistent." Tr. I, p. 23 (Bagdikian testimony). None of those opportunities exists as a practical matter in the alternative sources of information available to newsmen under the current Policy Statement. See ¶24, *supra*.

c. In the prison context, newsmen need to interview, for purposes of corroboration, not only inmates known to have particularized grievances but also other inmates likely to have knowledge concerning the grievances. PX 63, p. 21 (Machacek deposition).

d. The opportunity for a face-to-face interview is as important to a newsman gathering news as it is to an attorney developing his case, Tr. II, p. 14 (Liman testimony), or a Police detective investigating a crime. Tr. II, P. 130 (Leland testimony).

e. Face-to-face interviews with news sources play such a fundamental role in the news-gathering process that the development of interviewing techniques is a central feature

of the curricula of the nation's most prestigious journalism schools. Tr. II, pp. 30-32 (Fisher testimony); PX 14, pp. 8-10 (Abel deposition).

f. The Court was cited a number of examples in which face-to-face interviews played the critical role in newsmen's decisions to pursue a news story or not to publish the story. Tr. II, pp. 33-35 (Fisher testimony); *id.* at 116-20 (Leland testimony); PX 14, pp. 11-13 (Abel deposition); PX 63, 15-18 (Machacek deposition).

g. In one instance cited to the Court, the *Boston Globe's* coverage of a jail disturbance was based solely on the statements of jail officials and attorneys for the inmates because its newsmen were not allowed to interview the inmates. The result was "rather grim black headlines" about mistreatment of inmates that the editor who supervised the story did not believe constituted responsible journalism. Tr. II, pp. 120-22, 139 (Leland testimony). But the newspaper had no choice but to report the story on the basis of the inadequate information available to it. *Id.* at p. 122.

h. The plaintiffs placed in evidence a study published by Journalism Quarterly which analyzed the reasons for inaccuracies in news stories. PX 10. A major conclusion of that study is that "lack of contact between the newsman and a news source increases the chance that serious subjective errors will be perceived as occurring or will occur." *Id.* at 756.

i. The report of the New York State Special Commission on Attica, PX 9, was based principally on some 3,000 interviews, 1,600 of them with inmates at that penal institu-

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tion. Tr. II, p. 7 (Liman testimony). It was the most comprehensive program of face-to-face interviews ever undertaken by persons other than prison authorities at a prison. *Id.* The General Counsel to the Commission recited to the Court an extensive catalog of significant information obtained through interviews with inmates that could not have been obtained in any other manner. *Id.* at 11-14. The Commission's experience was that confidential interviews with individual inmates were indispensable for the gathering of reliable information about conditions in prison, prisoner grievances and events in which inmates participate.

j. A sociologist with extensive experience in prison administration testified that he could obtain an understanding of a penal institution only if he had the opportunity to conduct face-to-face interviews with inmates and prison officials. PX 65, p. 48 (Mattick deposition).

27. Based on the evidence recited in paragraph 26, *supra*, the courts finds that the accurate and effective reporting of news about prison conditions and events and prisoner grievance has a critical dependence upon the opportunity for face-to-face interviews with inmates.

28. The Court further finds that interviews with inmates, to be effective and productive, must occur in privacy, with only the newsman and inmate present. The presence of prison officials or prison employees can have an inhibiting effect on the interview process because "a prison official has total control over the life of a prisoner and [the prisoner] knows it." Tr. I, p. 24 (Bagdikian testimony). Even the presence of other inmates is likely to prevent a candid exchange with the newsman because the inmate being in-

terviewed must be concerned with how the other inmates will react to the information he conveys. Tr. I, pp. 17-18 (Bagikian testimony); Tr. II, pp. 10-11 (Liman testimony).

* * *

B. *Other Security Problems*

47. The Court finds that press interviews with inmates are not likely to create any additional prison security problems. Tr. II, p. 88 (Boone testimony); PX 64, pp. 47-49 (Bensinger deposition).

a. Security procedures used by prison administrators to prevent the introduction of contraband by friends, relatives, attorneys, and other visitors to prisoners are readily applicable to newsmen entering prisons to interview inmates, without any loss of effectiveness. Tr. II, p. 88 (Boone testimony); PX 64, pp. 47-48 (Bensinger deposition).

b. Members of the press are no more likely to introduce contraband than are lawyers, friends, relatives, or other visitors. PX 64, p. 48 (Bensinger deposition).

c. Members of the press are no more likely to participate in escape plans, to solicit offenses, or to make other unlawful or improper communications with inmates than are lawyers, friends, relatives, or other visitors. PX 64, p. 49 (Bensinger deposition).

C. *Administrative Burdens*

48. The Court finds that press interviews with inmates will create no undue administrative burdens in view of the fact that prison officials have the power to set reasonable

restrictions as to time and place, as they do for all visits to penal institutions. Tr. II, p. 88 (Boone testimony); PX 64, p. 51 (Bensinger deposition).

a. The visiting facilities at penal institutions are frequently not used to their full capacity, and thus are available for press interviews with inmates. Tr. II, pp. 181-82 (Alldredge testimony). Other facilities—e.g. conference rooms used for attorneys visit—are also likely to be available at many institutions. PX 64, p. 24 (Bensinger deposition).

b. Those jurisdictions which generally permit press interviews with inmates have had a relatively small number of requests for such interviews. Tr. II, p. 239 (Brewer testimony); Tr. I, p. 75 (Malcolm testimony); Tr. I. p. 99 (Anderson testimony); PX 64, p. 52 (Bensinger deposition). In these same jurisdictions, there has been considerable public interest in the prison system. Tr. I, p. 75 (Malcolm testimony); Tr. II, pp. 77-78 (Boone testimony).

c. Most large penal institutions facilitate thousands of interviews per year between inmates and their friends, relatives, and counsel. Tr. II, pp. 178-79 (Alldredge testimony); Tr. I, p. 67 (Malcolm deposition); PX 64, p. 53 (Bensinger testimony). The number of press interviews likely to occur, and the resulting administrative burden, are insignificant in relation to the total number of interviews granted each year. PX 64, p. 53 (Bensinger deposition).

d. Press interviews with inmates do not create significantly greater administrative burdens than other visits from friends, relatives, and counsel. Tr. II, p. 88 (Boone

testimony); but *cf.* PX 64, pp. 49-51 (Bensinger deposition).

V. *Benefits of Press Interviews to Correctional Systems*

49. The Court finds that opportunities for inmates to speak to newsmen tend to reduce tensions within the inmate population of a prison. Tr. I, 73 (Malcolm testimony); Tr. II, p. 83 (Boone testimony).

50. The Court finds that a policy of freely permitting interviews between members of the press and inmates is likely to increase press and public interest in corrections, and may lead to public pressure for improvements in correctional facilities, programs, and administration. Tr. II, pp. 78-79, 80, 84-86 (Boone testimony); PX 65, pp. 45, 26 (Mattick deposition); Tr. I, pp. 72, 73 (Malcolm testimony).

* * *

VI. *Policies in American Jurisdictions*

52. Evidence was received showing the current policy with respect to confidential in-depth interviews between members of the press and inmates of correctional institutions in 24 American jurisdictions. The Court finds that of these, 11 generally permit such interviews. See Ex. 1 to PX 64 (Bensinger deposition) (Illinois); PX 22-A (Maine); PX 23-A (Maryland); PX 25-A (Nebraska); PX 28-A (North Carolina); PX 29-A (Ohio); PX 35-A, 35-C (Vermont); DX 7 (Iowa); PX 1, 2, 3 (New York City); PX 5, 6 (District of Columbia); Tr. II, 58-77 (Boone testimony) (Massachusetts). Seven American jurisdictions have policies that neither generally permit nor generally

deny such interviews, but vest in correctional administrators discretion to permit or deny them in individual cases. See PX 18-A (Alaska); PX 20-A (Georgia); PX 24-A (Montana); PX 26-A (New Jersey); PX 30-A (Oregon); PX 31-A (Pennsylvania); PX 32-A (South Carolina). Five American jurisdictions generally prohibit such interviews. See PX 19-A (Connecticut); PX 21-A (Kentucky); PX 33 (Virginia); PX 34-A (Wisconsin); Tr. I, p. 114 (California). New Mexico has a unique policy, which does not fit into any of these categories. See PX 27-A, 27-B (New Mexico).

53. The Court finds that there is no substantial reason to believe that the problems involved in administering the federal prisons are more severe than those involved in administering prisons in the 11 jurisdictions that generally permit press interviews. Tr. II, pp. 58, 110-B (Boone testimony); Tr. I, pp. 62, 88 (Malcolm testimony); Tr. I, pp. 104-07 (Colloquy between the Court and Mr. Hannon); PX 65, pp. 41-42 (Mattick deposition). Contra, Tr. II, pp. 209-10, (Wainwright testimony); PX 64, pp. 65-67 (Bensinger deposition).

a. Federal prisons have a higher percentage of white collar criminals and inmates committed for non-violent crimes than do state or local prisons. PX 65, pp. 41-42 (Mattick deposition).

b. From a correctional point of view, inmates held for trial are far more difficult to manage than are sentenced offenders. Tr. I, p. 88 (Malcolm testimony).

54. The Court finds that defendants have not shown that from a correctional point of view the Federal Bureau of

Prisons has any substantial interest in having an absolutely uniform policy with respect to press interviews with inmates applicable at all institutions and to all inmates under its jurisdiction. See Tr. II, pp. 253-61 (Carlson testimony).

a. The policy of the Federal Bureau of Prisons is not to make all its institutions uniform, to have them all uniformly administered, or to treat all inmates as if they had the same correctional needs. Quite the contrary, the policy of the Federal Bureau of Prisons is to establish and maintain various types of institutions, having different correctional policies and serving different correctional needs, so that different inmates are subjected to different institutional experiences in federal correctional institutions. Tr. II, p. 260 (Carlson testimony); DX 11 (Federal Bureau of Prisons Biennial Report, 1970-71).

b. Even among institutions where uniformity may be sought as a matter of policy, in a large number of respects it is not, and cannot be, achieved. Every prison reflects the background, personality, style and training of its chief administrator; the personal qualities of its staff; the region in which it is located; and the daily life of its inmates is affected by its particular physical plant and other resources. As these differ from one institution to another, the inmates at those institutions will inevitably experience significant differences in their rights, privileges and opportunities. In view of these differences, any differences in the administration of a policy vesting some discretion in prison administrators over the holding of press interviews are of trivial or very minor significance. PX 65, pp. 42-45 (Mattick deposition).

Appendix C—Plaintiffs' Proposed Findings of Fact and Conclusions of Law

VII. *Feasibility of a Press Interview Policy Vesting Significant Discretion in Prison Officials*

55. The Court finds that state and federal prison officials are able in most cases, and with no more than ordinary human error, to identify actual and potential big wheels and trouble-makers within their institutions.

a. Within the first few weeks of commitment to federal prison, all inmates within the jurisdiction of the Federal Bureau of Prisons receive a thorough evaluation, including intensive diagnostic studies. DX 11, p. 7 (Federal Bureau of Prisons Biennial Report 1970-71). The results of this evaluation are available to prison administrators and are the basis for many significant decisions made with respect to the handling of inmates.

b. In general, and with no more than ordinary human error, prison administrators and their staffs know who are the actual and potential trouble-makers within their institutions at any given time. See Tr. II, p. 189 (Alldredge testimony); *cf.* Tr. II, pp. 193, 196-97 (Wainwright testimony).

56. Information similar to that available to federal prison officials is the basis for the operation of Illinois' policy, which generally favors press interviews with individual inmates, but vests significant discretion in prison administrators. This policy has proved to be feasible in Illinois, and has worked satisfactorily. PX 64, pp. 28-31 (Bensinger deposition).

57. The Association of State Correctional Administrators has promulgated a guideline on relations between news

media and prisons which provides for discretion in prison administrators to grant or deny interviews on an individual basis. Ex. 2 to PX 64 (Bensinger deposition). In promulgating that guideline, the ASCA took the view that such a policy would work effectively. PX 64, p. 43 (Bensinger deposition).

58. The National Council on Crime and Delinquency has promulgated a Model Act for the Protection of Rights of Prisoners, § 7 of which provides, *inter alia*, that "[a]ny . . . citizen may make application to visit an institution and talk in private with prisoners if the applicant establishes a legitimate reason for such visit and if the visit is not inconsistent with the public welfare and the safety and security of the institution. The director may reject any such application if the visit or any aspect thereof would be disruptive to the program of the institution." Section 7 further provides:

> "If the application for a visit is denied, the person may apply to [court of general jurisdiction] for an order directing the head of the institution to permit the visit. Such order shall be granted after notice and hearing if it is found that (a) the person is a representative of a public concern regarding the conditions of the prison, (b) he is not a mere curiosity seeker, and (c) it is not established by the head of the institution that the visit, or any aspect of it, would disrupt the program of the institution." PX 15, pp. 18-19 (NCCD Model Act).

This provision plainly contemplates that newsmen shall have opportunities to have private interviews with inmates, subject to discretion in prison administrators to prohibit

such interviews where necessary in the interest of protecting the functioning of the institution. The NCCD and the committee which drafted the model act plainly have concluded that the exercise of such discretion by prison administrators is feasible and consistent with correctional goals.

59. The fact that 19 American jurisdictions have policies which permit interviews while giving greater or lesser scope for the exercise of discretion by prison administrators, see paragraph 52, *supra*, shows that a very broad spectrum of opinion of professional correctional administrators in all parts of the United States believe that a policy granting some degree of discretion to correctional administrators with respect to the permitting or denying of interviews between newsmen and inmates is feasible and consistent with correctional goals.

60. On the basis of the evidence before it, and paragraphs 55 to 59, *supra*, the Court further finds that a policy vesting significant discretion in prison officials with respect to the holding of interviews between inmates and members of the press is feasible and consistent with correctional goals.

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